STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TEACHERS ASSOCIATION OF LONG BEACH, Charging Party, v. LONG BEACH UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-1151 Request for Reconsideration PERB Decision No. 721 PERB Decision No. 721a June 6, 1989

Appearances: California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Teachers Association of Long Beach; McLaughlin & Irvin by Lawrence J. McLaughlin, Attorney, for Long Beach Unified School District.

Before Hesse, Chairperson; Craib, Shank and Camilli, Members.

DECISION

Camilli, Member: The Teachers Association of Long Beach requests reconsideration of Decision No. 721, issued by the Public Employment Relations Board (PERB or Board) on March 3, 1989. Having duly considered the request for reconsideration, the Board itself hereby denies the request for the reasons that follow.

Pursuant to PERB Regulation 32410(a), the grounds for requesting reconsideration are limited to

> . . . claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

This request for reconsideration consists of assertions that the Board made prejudicial errors of law, decided an issue not raised by the parties, and failed to address the issue regarding

the reasonableness of the employer's regulations governing the internal mail service. As these assertions do not meet the standards set forth in PERB Regulation 32410(a), the reconsideration request must be denied.

ORDER

The request for reconsideration of PERB Decision No. 721 (Case No. LA-CE-1151) is hereby DENIED.

Member Shank joined in this Decision.

Chairperson Hesse's concurrence begins on page 3.

Member Craib's concurrence begins on page 8.

Hesse, Chairperson, concurring: While I agree with the majority that the request for reconsideration should be denied, I would address each of the arguments raised by the Teachers Association of Long Beach (TALB or Association) in its request for reconsideration.

The Association asserts that the Public Employment Relations Board (PERB or Board) misread the decision by the United States (U.S.) Supreme Court in Regents of the University of California v. Public Employment Relations Board (1988) 485 U.S. [99 L.Ed.2d 664] (Regents) by: (1) failing to consider the Association's status as an exclusive representative; (2) failing to consider the content of the TALB newsletters; and (3) failing to consider the exceptions available to the Association by limiting its discussion to only the Letters of the Carrier and Private Hands Without Compensation exceptions. The Association also argues that the Board distorted the definition of "newspaper" at 66 C.J.S., Newspaper, section 1, page 22, and ignored the footnote to 39 C.F.R, section 310.1(a)(7), which states that if there is any question whether the material may properly be excluded by definition, then the material falls within the exceptions to the Private Express Statutes. Finally, the Association asserts that the Board decided the status of the TALB newsletter under the Private Express Statutes, and failed to decide the reasonableness of the Long Beach Unified School District's (District) internal mail regulations.

The Association's argument that the Board misread, misinterpreted or misapplied Regents is without merit. The Regents case does not constitute "newly discovered evidence or law." At the time the administrative law judge issued his proposed decision, the U.S. Supreme Court had not rendered its decision in Regents. However, the parties were well aware of the significance of Regents to their case and addressed this issue in their post-hearing briefs. As the Regents decision was final before the Board rendered its decision in PERB Decision No. 721, the Board considered Regents in its disposition of this case.[1] The fact that the Association disagrees with the Board's application of Regents to their case does not constitute grounds for granting reconsideration.

Notwithstanding the fact that the Association has not stated any grounds for reconsideration, the Association's reading of Regents is inaccurate. The Board, in University of California at Berkeley (Wilson) (1984) PERB Decision No. 420-H, held that access rights of employee organizations are statutory irrespective of whether the employee organization is the exclusive or non-exclusive representative. (Id. at pp. 27-28, 32.) Based on the Board's holding, the U.S. Supreme Court did not differentiate between an exclusive and non-exclusive representative in its discussion of the Letters of the Carrier

[1]Although the Association requested to brief the application of Regents before the Board issued its decision, PERB denied this request and stated that no additional briefing would be permitted.

exception. Thus, the decision encompasses the use of internal mail systems by both exclusive and non-exclusive representatives. Even so, the TALB newsletter clearly contains the current business of only the Association (i.e., upcoming events, including elections, meetings, and membership campaign, and updates on negotiations, unfair practice charge hearings, and legislative bills). The fact that the Association is the exclusive representative does not mean that its business also constitutes the District's business. Even if the TALB newsletters constituted the current business of the District, the Letters of the Carrier exception also requires that the letters are sent by or addressed to the person carrying them. As the District is carrying the Association's newsletter through the District's internal mail system, this condition is not satisfied. As neither condition of the Letters of Carrier exception is satisfied, the Association's argument must fail. Finally, contrary to the Association's argument, the Board, in its determination that the newsletters were letters under the Private Express Statutes, considered the content of the TALB newsletter and other applicable exceptions under the Private Express Statutes.

The Association next argues that the Board distorted the definition of "newspaper" and ignored a footnote in the postal regulations. In its decision, the Board considered different sources to help define the terms "newspaper" and "periodical." No one definition was conclusive. Rather, the Board looked to

the common characteristics in the various definitions. Further, the Board accurately quoted the definition of "newspaper" at 66 C.J.S., Newspaper, section 1, page 22.

The footnote referred to by the Association at 39 C.F.R, section 310.1(a)(7) states:

> Several of the items enumerated in this paragraph (a)(7) do not self-evidently lie outside the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).

As the Board found that the TALB newsletter was not a "newspaper" or "periodical," but, rather, a "letter" under the postal regulations, the above-quoted footnote is inapplicable. Additionally, the Association's argument that the newsletter falls under the second-class mail definition of "newspapers and other periodical publications" is not dispositive. The fact that the materials may be sent by second-class mail does not mean that they fall within an exception to the Private Express Statutes.

Finally, the Association's argument that the Board decided the status of the TALB newsletter under the Private Express Statutes, and failed to decide the reasonableness of the District's internal mail regulations is without merit. In response to the Association's argument that the status of the TALB newsletter under the Private Express Statutes was not litigated and that the Association was denied due process, the Board notes that this issue was addressed by both parties in

their post-hearing briefs, and that this issue was evident by the District's amended regulations, as well as the amended complaint and answer. The District's regulations permit the distribution of only the TALB newsletter through the District's internal mail system, and the record reveals that the Association used the District's internal mail system only to distribute its newsletter. The Board found that the TALB newsletter constituted a "letter" under the Private Express Statutes, and that no exceptions permitted the District to carry the newsletter through the District's internal mail system. As the Board held that the TALB newsletter could not be distributed through the District's internal mail system, the Board did not need to address the reasonableness of the District's regulations as applied to the TALB newsletter. Accordingly, the Board dismissed the complaint.

Member Craib, concurring: Though I continue to adhere to the points raised in my dissenting opinion in PERB Decision No. 721, I concur in the denial of the request for reconsideration of that decision. Given my fundamental disagreement with the majority's analysis in Decision No. 721, I am not unsympathetic to some of the arguments made in the reconsideration request. However, pursuant to PERB Regulation 32410(a), the proper grounds for reconsideration are limited to "prejudicial errors of fact, or newly discovered evidence or law . . . ." Here, the request for reconsideration consists solely of assertions that the Board made numerous errors of law. Therefore, the request may appropriately be denied.